

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John T. & Elizabeth V. Donnelly :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1977. :
:

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 4th day of April, 1985, he served the within notice of Decision by certified mail upon John T. & Elizabeth V. Donnelly, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John T. & Elizabeth V. Donnelly
64 Hamilton Ave.
Atlantic Beach, NY 11509

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
4th day of April, 1985.

David Parchuck

G. M. O. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

April 4, 1985

John T. & Elizabeth V. Donnelly
64 Hamilton Ave.
Atlantic Beach, NY 11509

Dear Mr. & Mrs. Donnelly:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JOHN T. AND ELIZABETH V. DONNELLY : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1977. :

Petitioners, John T. and Elizabeth V. Donnelly, 64 Hamilton Avenue, Atlantic Beach, New York 11509, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1977 (File No. 41937).

A small claims hearing was held before Thomas E. Drake, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1984 at 1:15 P.M. Petitioner, John T. Donnelly, appeared pro se, and for his wife, Elizabeth V. Donnelly. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether petitioners, John T. and Elizabeth V. Donnelly, timely filed a New York State personal income tax return for the year 1977.

II. Whether a refund claimed by petitioners on a 1977 New York State personal income tax return, filed on July 13, 1981, was barred by section 687 of the Tax Law.

FINDINGS OF FACT

1. Petitioners, John T. and Elizabeth V. Donnelly, filed a 1977 New York State Income Tax Resident Return, with New York City Personal Income Tax, on July 13, 1981. On said return petitioners claimed a refund in the amount of

\$1,017.01. The refund consisted solely of excess income tax withheld from petitioners' wages.

2. The Audit Division treated the return filed on July 13, 1981 as a claim for refund and, on July 29, 1981, denied said refund on the ground that the claim was not timely filed.

3. Petitioners maintain that they filed their 1977 New York State return on April 14, 1978 claiming a refund of \$1,017.01 by placing the return in an envelope addressed to the Department of Taxation and Finance and then placing the envelope in a United States Postal Service mailbox on said date. Mr. Donnelly asserts that the return filed on July 13, 1981 was a facsimile of the return mailed on April 14, 1978. He does not have a copy of the return allegedly mailed on April 14, 1978 as he testified that it was not his practice to keep a copy of his state return.

4. Mr. Donnelly testified that he inquired about his 1977 refund at the Mineola, New York office of the Department of Taxation and Finance in March of 1979 and again in March of 1981. He testified that on each occasion he was unable to obtain any information concerning his 1977 refund.

5. The Audit Division has no record of a 1977 return filed by petitioners, other than the return filed on July 13, 1981.

6. On October 16, 1979, the Audit Division put petitioners on notice that they had no record of their filing a 1977 return by sending a letter to petitioners which provided in part as follows:

"Under authorization of Federal law (Section 6103(d) of the Internal Revenue Code), this office has obtained information that you filed a Federal income tax return for the above year [1977] showing an address within this State, but we have been unable to locate your New York State income tax return."

7. In response to the October 16, 1979 letter, petitioners indicated that they filed a 1977 New York income tax return on form IT-201/208 on April 14, 1978. Petitioners also provided the address and social security number as shown on the return. Their response did not indicate that a refund was claimed on the return and not received, even though refund information was requested in the letter.

8. Petitioners filed a timely 1977 Federal income tax return and received the refund claimed thereon.

9. Petitioners' 1977 Federal income tax return was audited by the Internal Revenue Service which resulted in the disallowance of certain expenses totaling \$490.81. Petitioners did not report the audit changes to New York State as required by section 659 of the Tax Law.¹ The Federal audit report was dated March 6, 1979.

CONCLUSIONS OF LAW

A. That section 691(a) of the Tax Law provides, in relevant part, as follows:

"Timely mailing. -- If any return, declaration of estimated tax, claim, statement, notice, petition, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to be made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, or for making the payment, including any extension granted for such filing or payment, and only if such document or payment was deposited in the mail,

1 A Notice of Additional Tax Due was issued to petitioners on September 14, 1982 asserting tax due of \$55.50 based on the unreported Federal audit changes. The Audit Division has since cancelled the tax due based on the return filed by petitioners on July 13, 1981.

postage prepaid, properly addressed to the tax commission, bureau, office, officer or person with which or with whom the document is required to be filed or to which or to whom such payment is required to be made. If any document is sent by United States registered mail, such registration shall be prima facie evidence that such document was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section."

B. That section 691(a) of the Tax Law is patterned after section 7502 of the Internal Revenue Code, "Timely Mailing Treated As Timely Filing and Paying". Treasury Regulation section 301.7502-1(d)(1) provides as follows:

"Delivery. (1) Section 7502 is not applicable unless the document is delivered by United States mail to the agency, officer, or office with which it is required to be filed. However, if the document is sent by registered mail or certified mail, proof that the document was properly registered or that a postmark certified mail sender's receipt was properly issued therefor, and that the envelope or wrapper was properly addressed to such agency, officer, or office shall constitute prima facie evidence that the document was delivered to such agency, officer, or office."

C. That section 691(a) of the Tax Law does not apply unless the return in question is actually delivered to the proper agency with which it is required to be filed. When the Audit Division denies receipt of a return, the person required to file has the burden of proving delivery (See Treas. Reg. §301.7502(d)(1); section 689(e) of the Tax Law).

D. That petitioners have failed to sustained their burden of proof to show that the return allegedly mailed on April 14, 1978 was actually delivered to the Department of Taxation and Finance. The evidence adduced at the hearing is insufficient to satisfy the requirement of proving delivery. Accordingly, petitioners initial and only claim for refund for the year 1977 was filed on July 13, 1981.

E. That section 687(a) of the Tax Law provides that a claim for refund of an overpayment of income tax shall be filed by the taxpayer within three years

from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later. If a claim is filed within the three year period, the amount of the refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return.

F. That section 687(i) of the Tax Law provides that, for the purposes of section 687, any income tax withheld from the taxpayer during any calendar year shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year.

G. That the refund claimed by petitioners on their 1977 return, filed on July 13, 1981, was properly denied by the Audit Division. The refund amount consisted solely of income tax withheld. Said tax was deemed paid on April 15, 1978 by virtue of section 687(i) of the Tax Law. Therefore, said refund is specifically barred by the provisions of section 687(a) of the Tax Law, since the withholding tax in question was not paid within the three years immediately preceding July 13, 1981.

H. That the petition of John T. and Elizabeth V. Donnelly is denied and notice of refund denial dated July 29, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1985


PRESIDENT


COMMISSIONER


COMMISSIONER